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BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF  
ROBERT and BETTE WILLIAMS,

Appellant,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 86-63

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
ORDER

This matter, the appeal from a Department of Ecology Order imposing a \$400 fine for alleged illegal diversions from the Methow River came on for hearing before the Pollution Control Hearings Board, Lawrence J. Faulk (presiding), and Wick Dufford, at a formal hearing in Wenatchee, Washington, on August 7, 1986.

Appellant represented himself. Respondent Department of Ecology appeared by V. Lee Okarma Rees, Assistant Attorney General.

Witnesses were sworn and testified. Exhibits were examined. From

1 testimony heard and exhibits examined, the Board makes these

2 FINDINGS OF FACT

3 I

4 Respondent Washington Department of Ecology (WDOE) is a state  
5 agency charged with the allocation and regulation of surface and  
6 ground water usage within the state.

7 II

8 Appellant Williams owns property in Section 20 and 29, Township 30  
9 North, Range 18 East, in Okanogan County. The Methow River runs along  
10 this property. The instant controversy involves diversions from this  
11 river.

12 III

13 On June 29, 1974, Mr. Williams applied for a surface water permit  
14 (S4-23715), to divert 0.13 cfs, up to a maximum of 16 acre feet per  
15 year, from the Methow, to be used from May 1 to September 1, for the  
16 irrigation of 5.5 acres. Also, on June 29, 1974, Mr. Williams applied  
17 for a second surface water permit (S4-23714), to divert 0.07 cfs, up  
18 to a maximum of 10.7 acre feet per year, from the Methow, to be used  
19 from May 1 to September 1 for the irrigation of a seperate 2.2 acres.

20 IV

21 The Department of Ecology (WDOE) adopted chapter 173-548 WAC,  
22 effective January 27, 1977, establishing minimum or base flows for the  
23 Methow River in the interests of fisheries requirements and other  
24 environmental values.

25 Differing flow levels in the river for differing times of the year

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1 were specified at particular gaging stations. Under the regulation,  
2 any later - approved irrigation uses from affected river reaches would  
3 have to cease when measured flows fell below the specified minimums.

4 V

5 After the adoption of the Methow River minimum flows, Ecology  
6 approved the Williams' two surface water applications and issued  
7 permits for each, expressly made subject to the minimum flow  
8 limitations. On May 1, 1979, certificates S4-23714C and S4-23715C  
9 were issued in relation to the Williams' diversions, again  
10 specifically conditioned on the established minimum flows.

11 VI

12 The summer of 1985 was very dry. In early August measured flows  
13 in the Methow fell below the minimums to which the Williams'  
14 certificates were explicitly subject. The WDOE sent personnel into  
15 the field to regulate all water users subject to the cut-off  
16 requirement.

17 VII

18 On August 6, 1985, an Ecology inspector personally advised Mr.  
19 Williams that the Methow River had dropped below the minimum flows set  
20 forth in chapter 173-548 WAC. Williams was told to refrain from  
21 further diversion for irrigation as authorized under his  
22 certificates. His pumps were posted with a notice indicating the  
23 "controlling works to which this notice is attached have been  
24 regulated."

1 Mr. Williams refused to turn off his pumps. He told the  
2 Department he could not turn off the pumps because his orchard needed  
3 water.

4 VIII

5 On August 7 and 8, 1985, the WDOE observed appellant Williams  
6 using both of his pump plants for irrigating his land.

7 IX

8 On August 13, 1985, WDOE issued Regulatory Order Number DE 85-604,  
9 which provided, in pertinent part:

10 The Department of Ecology is responsible for the  
11 supervision of public waters within the state and  
12 their appropriation, diversion (withdrawal), storage  
(dam safety), and use.

13 On August 6, 1985 Department of Ecology staff  
14 posted regulatory notices at the pumping stations on  
15 the Williams property in the SW1/4, SW1/4, Section  
20, Township 30 N. Range 23 E.W.M. and Government  
Lot 2, Section 29, Township 30 N., Range 23 E.W.M. in  
Okanogan County.

16 On August 7 and 8, 1985, Department of Ecology  
17 staff observed unauthorized pumping from said posted  
18 pumps. This constitutes violation of RCW 90.03.010,  
90.03.070 and 90.03.250.

19 In view of the foregoing and in accordance with  
the provisions of RCW 43.27A.190:

20 IT IS ORDERED THAT Robert and Betty Williams  
21 shall, upon receipt of this Order, cease and desist  
22 Methow River surface water diversion except as  
provided for in surface water certificates No.  
S4-23714C and S4-23715C.

23 Also, on August 13, 1985, WDOE issued a Notice of Penalty Incurred  
24 and Due (DE 85-603) for four separate violations, assessing a total  
25

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1 civil penalty of \$400 for the pumping at each of the two pump stations  
2 on August 7 and 8, 1985.

3 X

4 Mr. Williams filed an application for relief from the \$400 penalty  
5 imposed. On December 16, 1985, WDOE affirmed the \$400 penalty. On  
6 December 19, 1985, the Williams appealed, such appeal becoming our  
7 cause number PCHB 86-63.

8 XI

9 During the posting of diversions from the Methow in August of  
10 1985, Ecology personnel met with assertions from some water users that  
11 they had filed claims to rights older than shown on their permits or  
12 certificates. These people were advised to call the agency's regional  
13 office in Yakima to discuss these claims with persons having access to  
14 the files. The agency staff was kept busy fielding such calls and  
15 conducting researches. No call was received from the Williamses.

16 Later, after the enforcement actions were complete, a water right  
17 claim (WRC 164193) filed by the Williamses on June 27, 1974, was, by  
18 happenstance, discovered by the agency. Until then WDOE had been  
19 unaware of the filing.

20 The Williams' claim alleged a right to diversion from the Methow  
21 initiated prior to 1917, for 180 gallons per minute for the irrigation  
22 of 56.45 acres. The claim stated that 60 gpm for the irrigation of  
23 5.5 acres were currently used. The place of use claimed was the same  
24 as that later set forth on Certificate No. S4-23715C.

25 Upon discovering the claim document, WDOE sent a copy to Mr.

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1 Williams. Subsequently he relied on this claim in his appeal to this  
2 board.

3 XII

4 Following discovery of the Williams' claim to vested rights, WDOE  
5 undertook a tentative evaluation of its validity. In so doing they  
6 were able to refer to a remarkable set of field notes and drawings  
7 made by a certain J.F.R. Appleby in 1924. Appleby, an employee of the  
8 Supervisor of Hydraulics, a predecessor of today's Department of  
9 Ecology, surveyed uses on the Methow by personal observation and  
10 recorded his findings meticulously in a note book which has been  
11 preserved in the agency's files.

12 None of the lands presently owned and irrigated by the Williamses  
13 were under irrigation in 1924 according to Appleby's record.

14 WDOE's investigation of the Williams' claim also included  
15 examining a 1951 decree of the Okanogan County Superior Court by which  
16 the former Larrabee Irrigation District was dissolved. (Cause No.  
17 12,021). This decree recognized certain pre-1917 rights of the  
18 district and allocated the same among private owners of land within  
19 its boundaries. H.E. Farwell was apparently entitled to 0.13 cfs  
20 which under the decree would translate to the irrigation of 5.2 acres  
21 formerly in the irrigation district. In 1953, Mr. Farwell obtained  
22 approval from the Supervisor of Hydraulics for direct diversions from  
23 the river instead of from the old district ditch. Two new points of  
24 diversion were authorized, one to lands on the south side and one to  
25 lands on the north side of the river. Study of aerial photos from  
26 1954 show that Farwell's lands  
27

1 then had about 3.7 acres in cultivation on each side of the river.

2 From these sources, Ecology concluded that Farwell irrigated  
3 parcels of roughly equal size on either side of the river and that  
4 some expansion of use had occurred between dissolution of the district  
5 and the 1954 photo. They reasoned, therefore that the 5.2 acres  
6 recognized in the Larrabee decree was similarly divided between the  
7 two sides and that 2.6 acres could reasonably be attributed to the  
8 north side.

9 The Williamses eventually purchased Farwell's holdings on the  
10 north side of the river. WDOE's ultimate evaluation of the Williams'  
11 claim to vested rights was that no more than 2.6 acres of historically  
12 perfected irrigation use should be recognized.

13 We believe this evaluation is liberal. In view of Appleby's data  
14 showing no developments in 1924 on the lands the Williamses now own,  
15 WDOE's opinion on the claim assumes a change in place of use of some  
16 pre-1917 appropriation at a date after Appleby's survey, but before  
17 1951.

### 18 XIII

19 Any Conclusion of Law which is deemed a Finding of Fact is hereby  
20 adopted as such.

21 From these Findings of Fact, the Board comes to these

### 22 CONCLUSIONS OF LAW

#### 23 I

24 At the hearing on August 7, 1986, WDOE filed a Motion to Dismiss  
25 the appellant's appeal arguing that appellant had failed to state a

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1 claim upon which relief can be granted or alternatively for summary  
2 judgment.

3 We declined to consider the motion because adequate time to  
4 respond had not been provided to appellants in advance.

5 II

6 The foundation of this state's water law is the principle of  
7 priority of rights. The surface water code of 1917 expresses this  
8 concept in RCW 90.03.010, as follows:

9 The power of the state to regulate and control the  
10 waters within the state shall be exercised as  
11 hereinafter in this chapter provided. Subject to  
12 existing rights all waters within the state belong to  
13 the public, and any right thereto, or to the use  
14 thereof, shall be hereafter acquired only by  
appropriation for a beneficial use and in the manner  
provided and not otherwise; and, as between  
appropriations, the first in time shall be the first  
in right.

15 III

16 The Legislature has given WDOE the job of allocating water  
17 resources, through the issuance of permits, and modernly no diversions,  
18 are lawful except as authorized by a permit RCW 90.03.250. Permits  
19 are replaced by certificates of right upon perfection of an  
20 appropriation. RCW 90.03.330.

21 IV

22 The regulatory functions exercised by WDOE personnel in this case  
23 are the same as those previously performed by employees designated as  
24 water masters. RCW 90.03.070 provides, in part:

25 It shall be the duty of the water master to divide in  
26 whole or in part, the water supply of his district.  
He shall divide, regulate and control the use of



1 water within his district by such regulation of  
2 headgates, conduits and reservoirs as shall be  
3 necessary to prevent the use of water in excess of  
the amount to which the owner of the right is  
lawfully entitled.

4 This section then goes on to describe the "posting" process which  
5 was followed in this case.

6 V

7 Civil penalties are authorized by RCW 43.83.335 which reads:

8 The power is granted to the department of ecology to  
9 levy civil penalties of up to one hundred dollars per  
10 day for violation of any of the provisions of this  
chapter and chapters 90.03, 90.22, and 90.44 RCW, and  
11 rules, permits, and similar documents and regulatory  
orders of the department of ecology adopted or issued  
12 pursuant to such chapters. The procedures of RCW  
90.48.144 shall be applicable to all phases of the  
levying of a penalty as well as review and appeal of  
13 the same.

14 VI

15 We conclude that the diversions by the Williamses violated all  
16 three of the statutory provisions alleged as the basis for the civil  
17 penalty in this case: RCW 90.03.070, RCW 90.03.010 and RCW 90.03.250.

18 VII

19 Under existing precedent, it was unlawful for the Williamses to  
20 take matters into their own hands and continue to irrigate from the  
21 river after being ordered by WDOE not to. Such self-help in disregard  
22 of a water master's order was long ago recognized as an independent  
23 violation of the water code. State v. Lawrence, 165 Wash. 508, 6P.2d  
24 363, (1931). The recourse of the water user is through the appeals  
25 process provided by law.

26 This offense is what the agency was getting at in citing

1 appellants for the violation of RCW 90.03.070. Such was the theory on  
2 which the case was tried and, we conclude, the Williamses had adequate  
3 notice thereof. See Marysville v. Puget Sound Air Pollution Control  
4 Agency, 104 Wn.2d 115, 702 P.2d 469 (1985).

5 IX

6 The priority principle of RCW 90.03.010 requires that a junior  
7 appropriator refrain from all diversion when the water is needed to  
8 supply senior appropriations.

9 Under Washington law a minimum flow regime established by rule  
10 functions as an appropriation senior to all permits approved after it  
11 was established. RCW 90.03.247, RCW 90.03.345. The doctrine of  
12 relation-back is, by these statutory provisions, made inapplicable to  
13 such later-approved diversions.

14 Because the minimum flows for the Methow were in effect when the  
15 Williams' permits were approved, any diversions under their related  
16 certificates were required to cease by virtue of the law of priority  
17 when the river fell below such flows.

18 X

19 In granting permission to appropriate water, WDOE can condition  
20 the approval. RCW 90.03.290. See State v. Crown Zellerbach, 92 Wn.  
21 2d 894, 60 P.2d 1172 (1979). The scope of rights ultimately acquired  
22 under appropriation permits is no larger than the scope of permission  
23 granted. The minimum flows for the Methow, incorporated into the  
24

1 Williamses certificates, are limitations on the rights they acquired  
2 through the permit process.

3 Under the certificates, then, diversions contrary to the minimum  
4 flow restrictions constitute unauthorized diversions in violation of  
5 RCW 90.03.250.

6 X1

7 The only way the Williamses could escape regulation during a  
8 minimum flow episode would be to show WDOE convincing evidence of a  
9 right pre-dating establishment of the flow limits.

10 As to lands covered by Certificate S4-23714C there is no suggestion  
11 of such a right. However, as to lands covered by Certificate  
12 S4-23145C there is a possibility that at least some portion of the 5.5  
13 acres involved is covered by an earlier appropriation. The filing of  
14 the water rights claim (WRC 164193) preserved to Williamses ability to  
15 assert such a possibility. See RCW 90.14.071.

16 WDOE is not empowered to adjudicate rights, but tentative  
17 decisions as to the validity of unadjudicated rights must be made in  
18 considering enforcement action. See Funk v. Bartholet, 157 Wash. 584,  
19 289 Pac. 1018 (1930).

20 As in the instant case, WDOE usually recognizes appropriations  
21 reflected in state-issued permits or certificates. In such cases, the  
22 agency normally has some recent administrative experience in  
23 verification of the matters shown on the documents.

24 But, the validity of unadjudicated appropriations allegedly  
25

1 initiated prior to the permit system (pre-1917) is on a distinctly  
2 different footing. The bald assertions which appear on a claim form,  
3 relating solely to events long past, are of little value in themselves  
4 in demonstrating the truth of the matters asserted. See RCW 90.14.081.

5 Therefore, for the agency to give such a claim any credence, there  
6 must be evidence independent of the claim. And this type of evidence  
7 must be brought to the agency's attention soon enough to effectively  
8 influence the enforcement decision.

9 We believe it is the responsibility of the claimant to pre-code  
10 rights to bring the claim and information tending to verify the same  
11 timely to the attention of the agency in enforcement situations. The  
12 claimant must let the agency know that he is actively asserting the  
13 claim at that time.

14 One cannot sleep on one's rights and expect them to be  
15 vindicated. This principle is especially appropriate to the priority  
16 system where, if a senior appropriator does not demand his entitlement  
17 at a given moment, the water may be applied to junior priority uses.  
18 See Worley v. United Borax & Chemical Corp., 78 N.M. 112, 428 P. 2d  
19 651 (1967).

## 20 XII

21 Here WDOE implemented a process which allowed water users to make  
22 timely assertions of claims to vested right to which the agency could  
23 effectively respond. The Williamses did not take advantage of this  
24 procedure. They did not present their claim and evidence of its  
25 possible merit when such information could have done some good. Their

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1 knowledge of these matters was unearthed by the agency after the  
2 effects of the enforcement action, had it been obeyed, would already  
3 have been felt.

4 Even if their claim to vested rights might now be accorded some  
5 measure of recognition by the department, we conclude they cannot  
6 complain that the agency's actions in ordering them to stop diverting  
7 were improper when made.

8 We hold, therefore, that there was no error in regulating in  
9 accordance with the conditions and priority of Certificate S4-23715C.  
10 Accordingly, all the legal bases asserted for the assessment of the  
11 civil penalty were proper.

#### 12 XIII

13 Reading the civil penalty statute, RCW 43.83B.335, together with  
14 RCW 90.48.144, leads us to conclude that a separate penalty may be  
15 assessed for each violation committed. It is clear that the illegal  
16 use of the two diversion systems on two days constituted at least four  
17 separate acts of violation. We do not believe that assessing \$100 for  
18 each of these is unreasonable.

#### 19 XIV

20 Any Finding of Fact which is deemed a Conclusion of Law is hereby  
21 adopted as such.

22 From these Conclusions of Law the Board enters this.  
23  
24  
25

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ORDER

The Civil Penalty (DE 85-603) is affirmed.

Dated this 20<sup>th</sup> day of October, 1986.

POLLUTION CONTROL HEARINGS BOARD

 10/17/86  
\_\_\_\_\_  
LAWRENCE J. FAULK, Chairman

  
\_\_\_\_\_  
WICK DUFFORD, Lawyer Member